

## CIVIL LIABILITY OF CITIZEN ASSISTING IN FALSE ARREST

The common law bound all citizens of the county to attend the sheriff on his command, to pursue a felon when the "hue and cry" was raised. Those failing to respond were subject to possible fine or imprisonment.<sup>1</sup> This ancient burden of citizenship remains, for it is generally recognized that it is the duty of every citizen to assist in an arrest on the summons of at least a known peace officer.<sup>2</sup>

<sup>54</sup> *Tobin v. Van Orsdol*, 241 Iowa 1331, 1337, 45 N.W.2d 239, 243 (1950).

<sup>1</sup> I HOLDSWORTH, HISTORY OF ENGLISH LAW 294 (4th ed., 1931); I BLACKSTONE, COMMENTARIES \*343. For additional historical sketch see: III HOLDSWORTH, HISTORY OF ENGLISH LAW 599 (4th ed., 1931); IV HOLDSWORTH, HISTORY OF ENGLISH LAW 521 (4th ed., 1931).

<sup>2</sup> *Watson v. State*, 83 Ala. 60, 3 So. 441 (1888); *Mitchell v. State* 12 Ark. 50, 54 Am. Dec. 253 (1851); *Mackie v. Ambassador Hotel & Investment Corp.*, 123 Cal. App. 215, 11 P.2d 3 (1932); *Pow v. Beckner*, 3 Ind. 475 (1852); *Reed v. Rice*, 2 JJMarsh (Ky) 44, 19 Am. Dec. 122 (1829); *Vinton v. Weaver*, 41 Me. 430 (1856); *Firestone v. Rice*, 71 Mich. 377, 38 N.W. 885 (1888); *Elder v. Morrison*, 10 Wend(N.Y.) 128, 25 Am. Dec. 548 (1833); *Moyer v. Meier*, 205 Okla. 405, 238 P.2d 338 (1951); *Moyer v. Foster*, 205 Okla. 415, 234 P.2d 415 (1951); *Presley v. Ft. Worth & D.C. Ry. Co.*, 145 S.W. 669 (Tex. Civ. App., 1912); *McMahon v. Green*, 34 Vt. 69, 80 Am. Dec. 665 (1861).

For decisions holding the refusal to assist in an arrest a misdemeanor, see the following: *Dougherty v. State*, 106 Ala. 63, 17 So. 393 (1895); *State v. Ditmore*, 177 N.C. 592, 99 S.E. 368 (1919). For decisions where the citizen rightfully responded to a summons for assistance but was not justified in using excessive force, see: *People v. Brooks*, 131 Cal. 311, 63 P. 464 (1901); *Jefferson v. Yazoo & M.V.R.R. Co.*, 194 Miss. 729, 11 So.2d 442 (1943); *State v. Parker*, 335 Mo. 916, 199 S.W. 2d 338 (1947). Also recognizing the citizens' duty: *Downie v. Powers*, 193 F.2d 760 (1951); *Elrod v. Moss*, 278 Fed. 123 (1921); *Peterson v. Robison*, 43 Cal. App. 2d 690, 277 P.2d 19 (1954); *Goodwine v. Stephens*, 63 Ind. 112 (1878); *Cornet v. Commonwealth*, 198 Ky. 236, 248 S.W. 540 (1923); *Caperton v. Commonwealth*, 189 Ky. 652, 225 S.W. 481 (1920); *Grau v. Forge*, 183 Ky. 521, 209 S.W. 369 (1919); *Oystead v. Shed*, 12 Tyng (Mass.) 505 (1815); *State v. Johnson*, 362 Mo. 833, 245 S.W.2d 43 (1951); *Martin v. Houck*, 141 N.C. 317, 54 S.E. 291 (1906); *State v. Bertchey*, 77 N.J.L. 640, 73 Atl. 524 (1909); *Weatherford v. State*, 31 Tex. Crim. 530, 21 S.W. 251 (1893); *Staples v. State*, 14 Tex. App. 136 (1883); *Hooker v. Smith*, 19 Vt. 151, 47 Am. Dec. 635 (1829).

See also *Blackman v. City of Cincinnati*, 68 Ohio App. 495, 35 N.E.2d 164 (1941), *aff'd*, 140 Ohio St. 25, 42 N.E.2d 158 (1942), where in recognizing the duty, it was held that the citizen assisting an officer's summons could not recover from the city for damages to his automobile incurred in overtaking and arresting a law violator. But see the following, where the citizen responded to an officer's command and sustained an injury, and workman's compensation recovery was allowed: *Monte-rey County v. Rader*, 199 Cal. 221, 248 Pac. 912 (1926); *Anderson v. Bituminous Casualty Co.*, 155 Neb. 590, 52 N.W.2d 814 (1952); *Tomlinson v. Town of Norwood*, 208 N.C. 716, 182 S.E. 659 (1935); *Babington v. Yellow Taxi Corp.*, 250 N.Y. 14, 164 N.E. 726 (1928); *Mitchell v. Industrial Comm.*, 57 Ohio Supp. 319, 13 N.E.2d 736 (1936); *Shawano County v. Industrial Comm.*, 219 Wis. 623, 263 N.W. 590 (1935); *Krueger v. State*, 171 Wis. 566, 177 N.W. 917 (1920); *West Salem v. Industrial Comm.*, 162 Wis. 57, 155 N.W. 929 (1916). *Contra*: *Stoeckel v. Industrial Comm.*, 16 Ohio Supp. 171, *aff'd*, 77 Ohio App. 159, 68 N.E.2d 776 (1945).

Note also *Lansdon v. Washington County*, 16 Idaho 618, 102 Pac. 344 (1909), recognizing the citizen's duty and holding that one summoned to guard a prisoner is entitled to compensation from the county.

In Iowa, it is an indictable misdemeanor for any person not to assist in making an arrest when summoned to do so.<sup>3</sup>

It is the purpose of this discussion<sup>4</sup> to investigate the possible civil liability of one who, in the discharge of this duty, has assisted in a false arrest.<sup>5</sup> The problem posed has not as yet confronted the Iowa court but has, however, been determined in other jurisdictions.<sup>6</sup>

Factual situations involving the problem are not so commonplace as once they were, presumably due to the passing of the era of the posse which in turn is presumably due to the increase in law enforcement agencies. However the problem should not be con-

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<sup>3</sup> IOWA CODE § 755.11 (1954): "Any person making an arrest may orally summon as many persons as he finds necessary to aid him in making the arrest, and all persons failing to obey such summons shall be guilty of a misdemeanor." The punishment for a misdemeanor is provided in IOWA CODE § 687.7 (1954): "Every person who is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute of this state, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."

<sup>4</sup> The discussion here is limited to the fact situation where a citizen has assisted in an unlawful arrest, either at the behest of a peace officer or a fellow citizen. It is not intended to extend consideration as to why the arrest was unlawful. Parenthetically, a cause of action for false arrest will generally involve one of the following: absence of statutory authority; irregularity of process or warrant; arrest of the wrong person; lack of reasonable grounds or malicious intent. See, PROSSER, TORTS § 25 (1941); HARPER, TORTS § 55 (1933).

<sup>5</sup> The term "false arrest" is singularly applied in the present discussion in view of the problem revolving solely on the citizen's duty to assist in an arrest. It is recognized, however, that there is a fine distinction, if any, in the application of the terms "false arrest" and "false imprisonment". Generally, in an action where a false arrest is charged there is included a count for false imprisonment. Many of the cases cited herein use the term interchangeably. In *Fox v. McCurnin*, 205 Iowa 752 at 757, 218 N.W. 499 at 501, the court stated: "... although plaintiff has alleged false arrest ... and false imprisonment ... they are not distinguishable, and therefore amount only to a charge of false imprisonment, and do not state distinct causes of action." See also: PROSSER, TORTS § 12 (1941); HARPER, TORTS § 55 (1933).

As a practical matter, false arrest requires the actual participation in an arrest under the assumption of some legal authority, which is the point of discussion here, while false imprisonment can be raised without alleging the defendant's participating in an arrest or apprehension and where there might be no pretense of legal sanction. However, in an action arising out of an alleged false arrest, and where the defendant participated in the confinement of the plaintiff subsequent to assisting in the arrest, as a matter of pleading the charge of false imprisonment would be an additional element of damages. Also companion to these charges is that of assault and battery. For suggested method of pleading see: II MCCARTY, IOWA PLEADING §§ 1480, 1482 (1953).

<sup>6</sup> See note 2, *supra*.

sidered moot in this period of increased criminal activity.<sup>7</sup> Certainly it is within the realm of probability that citizens will be called upon to assist in arrest with increasing frequency.

The pertinent Iowa Code provisions require persons to render necessary aid in an arrest on the summons of "any person".<sup>8</sup> This is consistent with the provisions authorizing private persons<sup>9</sup> as well as peace officers<sup>10</sup> to effect arrests under the prescribed statutory conditions.<sup>11</sup>

In regard to situations where a citizen has responded to the command of a peace officer, what represents the greater and more recent authority is contained in those cases holding that an assisting citizen acting in good faith incurs no civil liability even though the summoning officer has in fact caused a false arrest and is himself subject to personal liability.<sup>12</sup> This position has been adopted by the American Law Institute.<sup>13</sup>

These authorities adhere to the doctrine that an assisting citizen may act without liability on the request or command of a known law enforcement officer,<sup>14</sup> or one he reasonably believes to be a law enforcement officer,<sup>15</sup> without inquiring as to the offense committed,<sup>16</sup> or the regularity of the process,<sup>17</sup> if such response is

<sup>7</sup> For statistical summary regarding crime, see: "Crime Trends", AMERICAN CITY, December, 1954, p. 13; BUSINESS WEEK, August 15, 1953, p. 99; TIME, March 30, 1953, p. 18; NEWSWEEK, December 6, 1954, p. 26; 42 NATIONAL EDUCATION ASSOCIATION JOURNAL 505.

<sup>8</sup> IOWA CODE § 755.11 (1954). The code section would seem to command all persons, irrespective of their Iowa citizenship. See RESTATEMENT, TORTS § 119, comment a (1934): "The phrase 'a private person' means any person other than a peace officer irrespective of whether he is or is not a citizen of the State or resident therein."

<sup>9</sup> IOWA CODE § 755.3 (1954).

<sup>10</sup> *Id.*

<sup>11</sup> IOWA CODE § 755.4 (1954), arrest by peace officers; § 755.5, arrest by private persons; § 755.6, arrest on oral order of magistrate. For an extensive discussion of arrest, see: Rollin Perkins, "The Law of Arrest", 25 IOWA L. REV. 201. For definition of arrest, see: IOWA CODE § 755.1 (1954); RESTATEMENT, TORTS § 112 (1934).

<sup>12</sup> *Watson v. State*, 83 Ala. 60, 3 So. 441 (1888); *Mackie v. Ambassador Hotel & Investment Corp.*, 123 Cal. App. 215, 11 P.2d 3 (1932); *Reed v. Rice*, 2 JJMarsh (Ky) 44, 19 Am. Dec. 122 (1829); *Firestone v. Rice*, 71 Mich. 377, 38 N.W. 885 (1888); *Moyer v. Meier*, 205 Okla. 405, 238 P.2d 338 (1951); *Moyer v. Foster*, 205 Okla. 415, 234 P.2d 415 (1951); *Presley v. Ft. Worth & D.C. Ry. Co.*, 145 S.W. 669 (Tex. Civ. App., 1912).

Recognizing the rule: *Peterson v. Robison*, 277 P.2d 19 (California, 1954); *Grau v. Forge*, 183 Ky. 521, 209 S.W. 369 (1919); *State v. Bertchey*, 77 N.J.L. 640, 73 A. 524 (1909); *Jenning v. Carter*, 2 Wend (N.Y.) 446, 20 Am. Dec. 639 (1829); *Weatherford v. State*, 31 Tex. Crim. 530, 21 S.W. 251 (1893). *Contra*: see cases in note 21, *infra*.

<sup>13</sup> RESTATEMENT, TORTS § 139, comment d (1934).

<sup>14</sup> *Firestone v. Rice*, 71 Mich. 377, 38 N.W. 885 (1888); *McMahan v. Green*, 34 Vt. 69, 80 Am. Dec. 665 (1861).

<sup>15</sup> *Presley v. Ft. Worth & D.C. Ry. Co.*, 145 S.W. 669 (Tex. Civ. App. 1912); *Weatherford v. State*, 31 Tex. Crim. 530, 21 S.W. 251 (1893). But see: *Cincinnati, N.O. & T.P. Ry. Co. v. Cundiff*, 166 Ky. 594, 179 S.W. 615 (1915).

<sup>16</sup> *Firestone v. Rice*, 71 Mich. 377, 38 N.W. 885 (1888).

<sup>17</sup> *Watson v. State*, 83 Ala. 60, 3 So. 441 (1888); *Moyer v. Meier*, 205 Okla. 405, 238 P.2d 338 (1951); *Reed v. Rice*, 2 JJMarsh (Ky) 44, 19 Am. Dec. 122 (1829); *Firestone v. Rice*, 71 Mich. 377, 38 N.W. 885 (1888); *McMahan v. Green*, 34 Vt. 69, 80 Am. Dec. 665 (1861).

in good faith and his resulting actions are not wanton or malicious,<sup>18</sup> and result from the officer's command and directions.<sup>19</sup>

The rationale of this position is based generally on the fact that every citizen is bound to assist a peace officer when called upon to do so, and that he consequently should not be punished for his good faith discharge of a legal duty. Furthermore, inasmuch as there is generally a necessity for an immediate response to the officer's command, if those summoned were required to examine and judge the legality of the arrest and then act, the value of the authority conferred upon the officer would be greatly diminished.<sup>20</sup>

A contrasting line of reasoning has been enunciated by some courts. They have held that the assisting citizen acting on the command and direction of a peace officer is protected in no greater degree than the summoning officer himself. Consequently, if the ensuing arrest is in fact unlawful, the assisting citizen, as well as the officer, must likewise respond in damages.<sup>21</sup> These authorities, although recognizing that to disobey a *lawful* command for assistance is unlawful, reason that a citizen is bound to respect lawful commands only, and that he is not obligated to act in response to unlawful commands.<sup>22</sup> This position is bottomed on the familiar principle that all men are bound to know the law.<sup>23</sup> Moreover, these courts reason that if it seems a hardship to require an assisting citizen to do so at his peril, it is equally harsh to permit the invasion with impunity of the rights of innocent persons falsely arrested.<sup>24</sup>

It would seem reasonable to expect the Iowa court to adopt what is described as the more recent and majority view: that an assisting citizen, bound by statute to render aid in an arrest on the summons of a peace officer, would not be liable for civil damages where he acted in good faith, not wantonly or maliciously, even though the arrest is later found to be in fact unlawful.<sup>25</sup> It would

<sup>18</sup> *Moyer v. Meier*, 205 Okla. 405, 238 P.2d 338 (1951). For cases where the citizen rightfully responded to an officer's summons to assist but was not justified in using excessive or unreasonable force in carrying out the command, see: *People v. Brooks*, 131 Cal. 311, 63 Pac. 464 (1901); *Jefferson v. Yazoo & M.V. R.R. Co.*, 194 Miss. 729, 11 So.2d 442 (1943); *State v. Parker*, 335 Mo. 916, 199 S.W. 2d 338 (1947).

<sup>19</sup> *Kirbie v. State*, 5 Tex. App. 60 (1878). (A mere volunteer who had not been called to aid in the search and resulting arrest not protected by the general proposition set out above.)

<sup>20</sup> *Watson v. State*, 83 Ala. 60, 3 So. 441 (1888); *Reed v. Rice*, 2 JJMarsh (Ky) 44, 19 Am. Dec. 122 (1829); *Firestone v. Rice*, 71 Mich. 377, 38 N.W. 885 (1888); *Moyer v. Meier*, 205 Okla. 405, 238 P.2d 338 (1951); *McMahan v. Green*, 34 Vt. 69, 80 Am. Dec. 665 (1861).

<sup>21</sup> *Mitchell v. State*, 12 Ark. 50, 54 Am. Dec. 253 (1851); *Pow v. Beckner*, 3 Ind. 475 (1852); *Oystead v. Shed*, 12 Tyng(Mass.) 505 (1815); *Vinton v. Weaver*, 41 Me. 430 (1856); *Elder v. Morrison*, 10 Wend(N.Y.) 128, 25 Am. Dec. 548 (1833); *Staples v. State*, 14 Tex. App. 136 (1883). *Contra*: see cases in note 12, *supra*.

<sup>22</sup> *Elder v. Morrison*, 10 Wend(N.Y.) 128, 25 Am. Dec. 548 (1833).

<sup>23</sup> *Id.* at 140, 25 Am. Dec. at 551.

<sup>24</sup> *Mitchell v. State*, 12 Ark. 50, 54 Am. Dec. 253 (1851); *Elder v. Morrison*, 10 Wend(N.Y.) 128, 25 Am. Dec. 548 (1833).

<sup>25</sup> See note 13, *supra*.



seem reasonable to assume that the privilege would be extended to the necessary acts of imprisonment subsequent to actual apprehension or arrest.

The cases representing this view do suggest certain general tests which would be of aid to the Iowa court in determining whether the assisting person should be accorded the privilege of non-liability. Such general tests are: (1) Did the assisting person act in reliance on the summoning officer's official capacity? (2) Did the assisting person act in accordance with the summoning officer's command and directions? (3) Was the assisting person's response in good faith? (4) Were the assisting person's resulting actions reasonable under the circumstances?

The problem is complicated where the person summoned to assist is also the complainant who instigated the arrest. Actual participation, as a volunteer, and not in response to a command, in an unlawful arrest will generally render the complainant-assisting citizen liable for civil damages.<sup>26</sup>

But what of the situation where the complainant-assisting citizen has been summoned or commanded to assist in the arrest? The courts have not as yet been called upon to resolve this problem, but it is submitted that they should impose liability only to the extent imposed upon the complainant when he has not participated in the arrest. The decisions which consider the liability of a citizen for unlawful arrest pursuant to his complaint are not harmonious.<sup>27</sup> However, general conclusions can be drawn. The complainant will be liable where he directs, countenances, or encourages the false arrest to the point that it is found that the officer acted on his directions as his agent.<sup>28</sup> But generally, when acting in good faith, there is no liability for merely giving information to peace officers,<sup>29</sup> or requesting a proper arrest,<sup>30</sup> or identifying the

<sup>26</sup> Howard v. Burton, 338 Mich. 178, 61 N.W. 2d 77 (1953). For additional cases where the opinions infer that active participation renders the complainant liable, see: Stueber v. Admiral Corp., 171 F.2d 777 (7th Cir. 1949); Cheseapeake & Potomac Tel. Co. v. Lewis, 99F2d 424 (D.C. Cir. 1938); Hughes v. Oreb, 36 Cal. App. 2d 854, 228 P.2d 550 (1951); Hammargren v. Montgomery Ward & Co., 172 Kan. 484, 241 P.2d 1192 (1952); Checkeye v. John Bettendorf Market, Inc., 257 S.W.2d 202 (Missouri, 1953); Harrer v. Montgomery Ward & Co., 124 Mont. 295, 221 P.2d 428 (1950).

<sup>27</sup> See collected cases in 21 A.L.R.2d 643, "Liability of private citizen for false arrest by officer."

<sup>28</sup> Casino Restaurant v. McWhorter 35 Ala. App. 332, 46 So.2d 582 (1950); Zinkfein v. W.T. Grant Co., 236 Mass. 228, 128 N.E. 24 (1920); Star Service v. McCurdy, 36 Tenn. App. 1, 251 S.W.2d 139 (1952).

<sup>29</sup> Stueber v. Admiral Corp., 171 F.2d 777 (7th Cir. 1949); Turner v. Mellon 257 P.2d 15 (California, 1953); Wilson v. Lapham, 196 Iowa 745, 195 N.W. 235 (1923); Zinkfein v. W.T. Grant Co., 236 Mass. 228, 128 N.E. 24 (1920); Baker v. Coon, 102 Neb. 243, 166 N.W. 555 (1918).

<sup>30</sup> Lemmon v. King, 95 Kan. 524, 148 Pac. 750 (1915).

individual wanted,<sup>31</sup> or swearing to a complaint before a magistrate who, unknown to the complainant, has no jurisdiction.<sup>32</sup>

Of course, a complainant-assisting citizen should not be relieved of liability where he has actual knowledge of the arrest's illegality and yet upon summons unites in its committal.<sup>33</sup>

What are the consequences to the assisting citizen where the individual requesting his assistance is a private citizen and the resulting arrest is unlawful?<sup>34</sup> There is authority holding that the assisting citizen must take the risk that the arrest is lawful.<sup>35</sup> The Iowa statutory provision, coupled with the peculiar facts of these cases, would seem to militate against the persuasiveness of this authority in the Iowa courts.<sup>36</sup>

The more reasonable and equitable approach would appear to permit the assisting citizen to escape liability if he acted in good faith.<sup>37</sup> For it is unreasonable to assume that the legislature, in creating the duty to respond to the summons of a fellow citizen and in providing a rather severe criminal penalty for the failure to discharge that duty,<sup>38</sup> intended that one acting by reason of this duty and in good faith should assume the risk of civil liability occasioned by his fellow citizen's negligence or bad faith.

Obviously, one summoned by a private citizen to assist in an arrest must be cautious. But he should be relieved of liability if he can answer the following questions affirmatively: (1) Was he acting by reason of his statutory duty? (2) Did he act in reliance upon the summoning citizen's representations that he was acting within the statutory scope of his privilege,<sup>39</sup> and all reasonable appearances indicated such? (3) Did he act in good faith? (4) Were his acts only those necessary and reasonable under the circumstances?

It is of course unsafe to predict a court's reaction to any particular factual situation. But it is submitted that the spirit of the law would require that an assisting citizen be absolved if he can show he responded in good faith to the "hue and cry."

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<sup>31</sup> *Bisgaard v. Duvall*, 169 Iowa 711, 151 N.W. 1051 (1915).

<sup>32</sup> *Smith v. Clark*, 37 Utah 116, 106 Pac. 653 (1910). See also where magistrate exceeded jurisdiction: *McGrew v. Holmes*, 145 Iowa 540, 124 N.W. 195 (1910).

<sup>33</sup> RESTATEMENT, TORTS § 139 (1934).

<sup>34</sup> IOWA CODE § 755.11 (1954).

<sup>35</sup> *Salisbury v. Commonwealth*, 79 Ky. 425 (1908); *Ryan v. Donnelly*, 71 Ill. 100 (1873); PROSSER, TORTS § 26 (1941).

<sup>36</sup> In *Salisbury v. Commonwealth*, note 35, *supra*, the Kentucky law provided that only an officer of the law had a statutory right to command assistance. In *Ryan v. Donnelly*, note 35, *supra*, the instigator of the arrest and the individuals carrying it out were obviously acting in bad faith.

<sup>37</sup> A defendant assisting citizen in Iowa would have the burden of justifying his acts. See, *Fox v. McCurnin*, 205 Iowa 752, 218 N.W. 499 (1928).

<sup>38</sup> IOWA CODE § 687.7 (1954). See note 3, *supra*.

<sup>39</sup> IOWA CODE § 755.5 (1954).